Presbyterian University Hospital d/b/a University of Pittsburgh Medical Center *and* International Union, United Plant Guard Workers of America (UPGWA) and its Local 502. Case 6–CA–26407

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

The issue in this case is whether the judge correctly found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by bargaining to impasse over a management-rights clause giving the Respondent the unilateral right to subcontract bargaining unit work.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Suzanne C. McGinnis, Esq., for the General Counsel.
Joel E. Cohen, Esq., of New York, New York, for the Respondent.

[1] On October 5, 1995, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] We conclude that the Respondent's proposal and insistence to impasse on a broad unilateral right to subcontract was not unlawful per se or under the totality of circumstances related to the bargaining in this case. We note that the General Counsel specifically relied only on the subcontracting proposal and on events preceding the parties' negotiations. We find that those preceding events, including certain unfair labor practices, do not suffice to prove that the Respondent engaged in bad-faith bargaining with respect to the mandatory bargaining subject of subcontracting unit work.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me in Pittsburgh, Pennsylvania, on May 9, 1995, on the General Counsel's complaint[1] which alleged that during negotiations for a collective-bargaining agreement with the Charging Party the Respondent insisted to impasse on an overly broad clause relating to its right to subcontract bargaining unit work, and thereby violated Section 8(a)(5) of the National Labor Relations Act.

The Respondent generally denied that it committed any violations of the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a not-for-profit corporation engaged in the operation of an acute care hospital providing medical care at its facility at Pittsburgh, Pennsylvania. In the course of this enterprise, the Respondent annually derives gross revenues in excess of $200,000 and annually receives goods, products, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Union, United Plant Guard Workers of America (UPGWA) (the Union) and its Local 502 are admitted to be, and I find are, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On November 27, 1989, the Union was certified as the exclusive bargaining representative in a unit of the Respondent's security guards. Following a challenge of the unit by the Respondent in a refusal-to-bargain matter,[2] the parties met 20 times between January 10, 1992, and May 19, 1994, to negotiate a collective-bargaining agreement. During the course of these negotiations, the Respondent submitted four proposals, and, according to the testimony of Kerry C. Lacey, the Union's chief spokesman, the Respondent changed its position on most items. Indeed, the parties agreed to about ''95 percent'' of a contract according to Local 502 President Joseph Durbin. The one item on which the Respondent made no movement concerned language in its proposed ''management rights'' clause relating to subcontracting; however, the Respondent did make proposals on a severance package and bargained about seniority, both of which relate to the effects of subcontracting.

In its proposal on management rights, the Respondent enumerated ''sole and exclusive functions, rights and responsibilities of management'' including, but not by way of limitation, the right ''to discontinue, transfer, subcontract, or outsource any or all of its Hospital operations.''

The General Counsel alleges that insisting to impasse on such a broad subcontracting clause is a per se violation of Section 8(a)(5) of the Act. In the alternative, the General Counsel alleges that adamant insistence on such a clause proves that the Respondent entered into negotiations with a

[1] This matter was consolidated with Case 6–CA–26906. During the hearing, and over the objection of the General Counsel, I approved a settlement of Case 6–CA–26906 between the Respondent and the Union.

[2] *Presbyterian University Hospital*, 298 NLRB 471 (1990), enfd. mem. 935 F.2d 1282 (3d Cir. 1991).

predetermination not to reach an agreement, and thus violated Section 8(a)(5).

B. *Analysis and Concluding Findings*

The parties had 20 meetings (perhaps 25) and there was movement on most items in dispute, including seniority. Indeed the only proposal on which the Respondent maintained an adamant position is the ''management rights'' clause, and specifically the language on subcontracting quoted above. The question then is whether insistence on such language is itself violative of the Act, or proves an unlawful intent not to reach an agreement. I conclude it does neither.

It is fundamental that the Act requires only that the parties bargain in good faith. Section 8(d) states they may not be compelled to accept any particular proposal, nor may the Board write contract proposals for the parties. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In reversing the administrative law judge's finding of bad-faith bargaining in *88 Transit Lines*, 300 NLRB 177 (1990), the Board stated at 178:

> Because, under Section 8(d) of the Act, the Board is constrained from making findings that would effectively compel a party to agree to particular proposals or make particular concessions, a fortiori, we risk running afoul of Section 8(d) if we predicate a finding of bad faith on a party's refusal to agree to the exact language of the other party's proposals. Indeed, a major function of the bargaining process is reaching common ground that represents modifications of language contained in parties' initial proposals.
>
> Of course, if a party is so adamant concerning its own initial positions on a *number* of significant mandatory subjects, we may properly find bad faith evinced by its ''take-it-or-leave-it'' approach to bargaining. Furthermore, there may be cases in which the substance of a party's bargaining position is so unreasonable as to provide some evidence of a bad-faith intent to frustrate agreement. [Emphasis added.] [Citations omitted.]

Counsel for the General Counsel has cited a number of cases in support of her position, but none which hold that instance by a party on a particular contract clause is evidence of bad faith. Thus in *Hydrotherm, Inc*., 302 NLRB 990 (1991), the Board noted that it was the employer's overall conduct and not the substance of any one clause insisted on which proved its bad faith. There, in addition to a broad management-rights clause, the employer demanded other concessions, including restrictive no-strike and arbitration clauses, agreement to which would have left the union in a worse position than having no contract. Such matters are absent here.

Here the parties agreed to virtually all the contract except the management-rights clause, and specifically the subcontracting provision. They agreed to no-strike and arbitration clauses; and they agreed to some aspects, at least, of the effects should the Respondent subcontract.

Thus, I conclude the facts here are closer to *Coastal Electric Cooperative*, 311 NLRB 1126 (1993); and *Holiday Inn Downtown-New Haven*, 300 NLRB 774 (1990). In *Coastal Electric*, the parties were at impasse on certain core issues, including the employer's management-rights proposal. The Board found hard bargaining, but not bad faith, noting ''that insistence on a broad management-rights clause is not itself inherently unlawful or evidence of bad faith.'' 311 NLRB at 1127.

In *Civic Motor Inns*, the parties reached an impasse in negotiations when the union refused to accept the company's proposal on subcontracting and the company refused to alter its proposal; inter alia, the General Counsel alleged that the respondent's insistence on the union's acceptance of its subcontracting proposal was violative of Section 8(a)(5). The judge dismissed this allegation and neither the General Counsel nor the Charging Party took exceptions. There is nothing the Board's decision there which would indicate that an employer may not insist to impasse on subcontracting language of the type in issue here.

No doubt bargaining on effects of subcontracting is required. However, the Respondent in fact made proposals regarding the effects of subcontracting. In any event, the only issue here is whether an employer can insist to impasse on a subcontracting clause, where there is no evidence of bad faith in negotiations. I conclude the Respondent may and therefore, I conclude that the complaint should be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The complaint is dismissed.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.